

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD McKENZIE,

Petitioner,

v.

THERESA CISNEROS,

Respondent.

Case No. 2:23-cv-02764-DAD-JDP (HC)

**ORDER**

SCREENING THE PETITION AND  
OFFERING LEAVE TO AMEND

ECF No. 1

DENYING MOTION TO APPOINT  
COUNSEL

ECF No. 3

Petitioner, a state prisoner, brings this action under section 2254 and claims that CDCR officials have violated his rights by failing to address four of his inmate grievances. ECF No. 1 at 4. This claim does not sound in habeas corpus, however. A claim falls within the scope of habeas corpus only if its success would necessarily result in the petitioner's earlier release from custody. *See Nettles v. Grounds*, 830 F.3d 922, 934-35 (9th Cir. 2016). Having reviewed the petition, I do not see how success on petitioner's grievance related claims would necessarily hasten his release. Accordingly, petitioner may, within thirty days of this order, either file an amended habeas petition that better explains why his claims warrant habeas relief or he may file a section 1983 complaint. I will defer ruling on petitioner's applications to proceed *in forma pauperis* until he makes his selection because the filing fee for these two types of actions differs.

1           Additionally, I will deny petitioner's request for appointment of counsel without  
2 prejudice. ECF No. 5. He is not entitled to counsel as of right in either a habeas or section 1983  
3 action. And I cannot weigh whether the discretionary factors warrant considering appointment of  
4 counsel until the type of action and scope of claims are settled.

5           It is hereby ORDERED that:

6           1. Within thirty days of this order's entry petitioner shall either file an amended habeas  
7           petition indicating why his habeas claims should proceed or submit a section 1983  
8           complaint. He must not do both.

9           2. The Clerk of Court is directed to send petitioner a section 1983 complaint form and a  
10           section 2254 complaint form with this order. Petitioner should return only one of  
11           these.

12           3. Petitioner's motion for appointment of counsel, ECF No. 3, is DENIED without  
13           prejudice.

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15           IT IS SO ORDERED.

16           Dated: January 25, 2024

  
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18           JEREMY D. PETERSON  
19           UNITED STATES MAGISTRATE JUDGE

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